No. 9038.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for Trumble Refining Company, a dissolved corporation,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

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CASES. PAGE

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BRIEF FOR THE UNITED STATES.

Opinion Below.

The memorandum opinion of the District Court, which was filed March 1, 1937 [R. 331-339], is not reported. The District Court subsequently made findings of fact and conclusions of law [R. 43-58].

Jurisdiction.

This case involves income and excess profits taxes for the calendar year 1917. On May 31, 1938, the District Court entered judgment in favor of the taxpayer for the full amount claimed, $33,575.01 (including interest) [R. 59-60]. The petition for appeal and assignment of errors

[R. 396-403] were filed on August 30, 1938, and an order allowing the appeal was filed on August 30, 1938 [R. 404]. The jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether a timely suit was entered after the rejection of a timely claim for refund?

2. After the Commissioner of Internal Revenue has made a special assessment of profits taxes, pursuant to Section 210 of the Revenue Act of 1917, may a court, in an action for refund of such taxes, revise the Commissioner's determination of the taxpayer's net income?

Statutes and Regulations Involved.

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pages 41 to 49.

Statement.

The facts set forth below are taken from the findings of fact of the District Court. [R. 43-57.]

The Trumble Refining Company within the time allowed by law and on March 29, 1918, and April 20, 1918, filed with the then Collector of Internal Revenue, John P. Carter, its original and amended income and excess profits tax returns, respectively, for the year 1917, wherein it disclosed a gross income of $97,503.11, deductions of $8,033.57, and a net taxable income of $89,469.54, which resulted in a tax liability, computed under Section 209 of the Revenue Act of 1917, of $11,870.68, which on June 14, 1918, was paid to the said Collector of Internal Revenue.

By letter dated February 21, 1920, the Commissioner of Internal Revenue proposed additional taxes against the Trumble Refining Company for the year 1917 in the sum of $6,365; in said letter of February 21, 1920, the Commissioner advised the Trumble Refining Company that in his opinion its business was of such a character as normally to require a substantial capital investment and the income was attributable to the employment of capital, and that therefore the tax liability of Trumble Refining Company could not properly be determined under the provisions of Section 209 of the Revenue Act of 1917; in said letter the Commissioner furthermore advised the Trumble Refining Company that in his opinion a large part of the Trumble Refining Company's invested capital could not be included under the statutory requirements for tax purposes and that therefore he had computed the tax under the provisions of Section 210 of the Revenue Act of 1917. [R. 45.]

The additional income and excess profits tax of Trumble Refining Company for the year 1917 in the sum of $6,365, as computed under the special assessment provisions of Section 210 of the Revenue Act of 1917 and proposed in said letter of February 21, 1920, were assessed by the Commissioner of Internal Revenue on May 17, 1920. [R. 45.]

Thereafter and on or about June 17, 1920, the Trumble Refining Company filed an amended income tax return for the year 1917, wherein it claimed a deduction for the exhaustion of its patent license agreements or royalty contracts in the sum of $54,121.42, based upon a March 1, 1913, value of $811,821.36, and wherein it disclosed an income tax liability of only $2,120.88. [R. 45.]

As a part of said last-mentioned amended return the Trumble Refining Company, on June 17, 1920, filed a claim for abatement of the said assessment made on May 17, 1920, of additional taxes in the sum of $6,365 for the year 1917, and also filed its claim for refund, demanding the return to it on account of the overpayment of taxes by it for the year 1917 of the sum of $9,749.80.

During August, 1921, the Commissioner of Internal Revenue, through his Internal Revenue Agent at Los Angeles, caused an investigation to be made in the matter of said amended return, said claim for refund and claim for abatement and, as a result of such investigation, additional income and excess profits taxes of $40,289.98 for the year 1917, and also large sums for the years 1918, 1919 and 1920 were proposed. Thereafter and under date of December 13, 1921, the Commissioner of Internal Revenue advised the Trumble Refining Company that its claim for refund filed on July 2, 1920, and its claim for the abatement of the taxes proposed by the Commissioner in his letter of February 21, 1920, were rejected.

On or about January 13, 1922, a demand for the payment of said additional income and excess profits taxes of $6,365 covered by the aforementioned claim for abatement and the Commissioner's letter dated February 21, 1920, together with accrued interest of $1,082.05, aggregating $7,447.05, was made upon the Trumble Refining Company by the Collector of Internal Revenue for the Sixth Collection District of California. On or about January 21, 1922, a second claim for abatement of said additional taxes for the year 1917 in the sum of $6,365 was filed with the Collector of Internal Revenue for the Sixth Collection District of the State of California.

On or about February 1, 1922, the Trumble Refining Company filed with the Commissioner of Internal Revenue a comprehensive brief and formal protest against the additional income and excess profits taxes proposed and set forth in the Revenue Agent's report, made by Revenue Agent Degele, dated August 17, 1921, for the years 1917 to 1920, inclusive, which brief and protest were prepared by such company's tax consultant, dealing with the subject-matter of assessment of Federal taxes against it for the years 1917 to 1920, inclusive; that in and by that brief the company protested against the proposed additional taxes for each of the last-mentioned years; that the principal contention discussed in the brief, and the one which the company asserted was applicable to and affected alike each of the years 1917 to 1920, inclusive, was its contention that it was entitled to an annual deduction of $54,-121.42 from income by reason of the annual exhaustion of the March 1, 1913, value of its patent license agreements; that said brief contained, among other things, a computation of Federal income taxes for the year 1917, and also showed and claimed that the total tax due the United States Government from the Trumble Refining Company for the year 1917 amounted to the sum of $2,091.59, and that it had paid a Federal tax for that year amounting to $11,870.68, and that there was a refund due to said company for said year of $9,679.09. [R. 47.]

On December 9, 1922, the Trumble Refining Company's income tax consultant, Mr. E. P. Adams, conferred with one of the officials of the Bureau of Internal Revenue, that official being then in charge of the Special Audit Section; and at such conference the company's tax consultant requested a hearing on the subject of the company's

taxes for the years 1917 to 1920, inclusive; that such official responded that the Bureau of Internal Revenue was not yet ready to take up the matter of the company's taxes for all of those years, but would hold in abeyance the consideration and final determination of the tax liability for 1917 until the company's taxes for the remaining years could also be reviewed and finally determined. At the request of such official, confirmed in writing by the Commissioner of Internal Revenue in a letter dated January 19, 1923, the Trumble Refining Company, on or about February 1, 1923, executed and filed with the Commissioner of Internal Revenue an income and excess profits tax waiver, being an unlimited waiver of the statute of limitations governing the time within which the Commissioner could make additional assessments of taxes against such company for the year 1917. [R. 48.]

On February 5, 1923, the Commissioner of Internal Revenue notified the Trumble Refining Company that its taxes for the year 1917 had been redetermined under the provisions of Section 210 of the Revenue Act of October 3, 1917, with the result that there appeared to be an overassessment of $151.17, which was abated. [R. 48.]

Under date of February 23, 1923, and in response to said notice, the Trumble Refining Company wrote to the Commissioner of Internal Revenue, calling attention to its said brief aforementioned, and also calling attention to the aforementioned conference had by its tax consultant with an official of the Bureau on December 9, 1922, at which conference request had been made for a joint consideration of all the years involved at a hearing to be held in Washington and, in such response, the company also requested that, under these conditions, further action be withheld in the matter of entering an overassessment

for 1917 and also requested the privilege of filing additional data to prove Trumble Refining Company's right to a substantial deduction for the exhaustion of its patent rights. [R. 49.]

On or about May 15, 1923, the Trumble Refining Company telegraphed the Commissioner of Internal Revenue that, in view of the understanding reached at the conference held December 9, 1922, and because the questions involved for the year 1917 affected all years, he should instruct the local Collector of Internal Revenue to withhold collection of additional taxes assessed for 1917, and that the Commissioner should fix a date for a conference, at which all years might be considered; that thereafter, and in response to the company's telegram, the Commissioner, on or about May 21, 1923, telegraphed the company that he had no authority to instruct the Collector to accept abatement claim to replace the claim rejected, but that a conference might be arranged on the 1917 case if a formal protest were filed and that it was impracticable on later years until information submitted was considered and audit completed. [R. 49-50.]

The income tax consultant of Trumble Refining Company in the early part of May, 1924, held a conference with an official of the Commissioner of Internal Revenue's office, and at that conference the company's representative delivered to the official a brief and protest containing additional data to support its right to an annual deduction from its gross income for the exhaustion of its patent license agreements based upon the March 1, 1913, value thereof. (It is the Government's contention that this protest and conference dealt solely with the 1918 tax year.) [R. 50.]

In that brief additional arguments were presented in support of the company's contention that it was entitled to the previously-claimed annual deduction from income by reason of the annual exhaustion of the March 1, 1913, value of its patent license agreements; that at the last-mentioned conference the company's representative discussed with the official the company's contentions respecting taxes as to all of such years and that, during such conference, the official had before him a file containing documents pertaining to the company's taxes for all of those years; that among such documents then in the hands of such official were the income tax returns, claims for refund and briefs, which briefs were filed on behalf of the company in February, 1922, and May, 1924, respectively, and also the Revenue Agent's report, upon which additional assessments had been proposed to be made against said company for the years 1917 to 1920, inclusive. [R. 50-51.]

On May 22, 1923, the Trumble Refining Company paid, under protest, to the then Collector of Internal Revenue Rex B. Goodcell the sum of $7,860.19, covering the additional taxes for 1917 of $6,213.83 ($6,365 minus $151.17), and accrued interest thereon of $1,646.36. [R. 51.]

On July 14, 1924, the Committee on Appeals and Review of the Commissioner's office considered the subject-matter of the assessment of additional taxes against said company and thereafter recommended (as to 1918, we submit) to the Commissioner that the March 1, 1913, value of said patent license agreements of Trumble Refining Company be fixed at the sum of $160,000 and that amortization be allowed to the company on account of exhaustion of the patent license agreements on the

basis of such valuation and that thereupon the recommendation was adopted by the Commissioner. [R. 51.]

The Committee on Appeals and Review also determined that the taxes of the Trumble Refining Company for the year 1918 should be computed under the provisions of Section 328 of the Revenue Act of 1918 and approved a rate of 41.37 per cent. The actions of the Committee on Appeals and Review in this respect were approved by the Commissioner of Internal Revenue. [R. 51.]

Thereafter appeals were taken by the Trumble Refining Company to the United States Board of Tax Appeals with respect to the company's taxes for the years 1918 and 1920 to 1923, inclusive, and thereafter and on or about November 19, 1928, the Board of Tax Appeals in the cases of Trumble Refining Company of Arizona, Docket No. 11763, involving the year 1918; Docket No. 17492, involving the years 1920 and 1921; Docket No. 26434, involving the year 1922, and Docket No. 32151, involving the year 1923, rendered its decision (reported in 14 B. T. A. 348), holding that the Trumble Refining Company on March 1, 1913, was the owner and in possession of patent license agreements which on March 1, 1913, had a fair market value of $850,000, and a remaining useful life from March 1, 1913, of eleven years eight months and twenty days, and was therefore entitled in the determination of its net taxable income to an annual deduction of $72,511.90 for the exhaustion and depreciation of the value of the patent license agreements; that on the 30th day of October, 1929, the United States Board of Tax Appeals entered its final order determining that the Trumble Refining Company was entitled to an annual deduction in the sum of $72,511.90 for the exhaustion of its license agreements. That neither the

Trumble Refining Company nor the plaintiffs took an appeal from the Board's decision and the decision became final. [R. 52.]

On or about April 25, 1929, the Trumble Refining Company filed with the Commissioner of Internal Revenue its "revised" claim for refund in the sum of $17,764.08 on account of taxes, plus interest thereon, paid for the year 1917 as aforesaid, such claim being computed in conformity with the aforementioned decision of the Board of Tax Appeals. The Commissioner of Internal Revenue, in his letter dated May 22, 1930, sent to the Trumble Refining Company, referred to claims for refund of the Trumble Refining Company for the years 1913, 1914, 1915, 1916, 1917, 1919, 1920, 1922 and 1923. The letter advised the taxpayer that since the Commissioner had not acquiesced in the decision of the Board of Tax Appeals with respect to the March 1, 1913, valuation of the license agreements for depreciation purposes, the company's contention could not be allowed for those years which were not pending before the Board, namely, 1913 to 1917, inclusive, and 1919. [R. 53-54.]

On July 25, 1930, the Commissioner of Internal Revenue notified the Trumble Refining Company in writing that its revised claim for refund filed on April 25, 1929, for the refund of 1917 taxes had been rejected. [R. 54.]

The Trumble Refining Company at no time requested or acquiesced in a determination of its excess profits taxes for the year 1917 in accordance with the provisions of Section 210 of the Revenue Act of October 3, 1917. [R. 55.]

The Court concluded as follows [R. 57-58]:

That subsequent to the original rejection of the company's first claim for refund and first claim for abatement, that is to say, that subsequent to December 13, 1921, and prior to February, 1923, and likewise subsequent to February, 1923, the Commissioner reopened and kept reopened and continued to give further consideration to the company's claims and contentions respecting taxes paid and also respecting additional taxes proposed to be assessed for the year 1917, that the company's claims and contentions respecting such taxes were still pending before and under consideration by the Commissioner on the date, to-wit, April 25, 1929, when said company filed its revised claim for refund, and that the company's claims and contentions respecting such taxes were finally passed upon and determined by the Commissioner when he rejected the revised claim for refund.

That the Commissioner's letters of February 21, 1920, and February 5, 1923, advising the Trumble Refining Company that its taxes had been computed under Section 210 of the Revenue Act of 1917 were not regarded by the Commissioner as final determinations of its tax liability, the essential factor, to-wit, the net income of the Trumble Refining Company not then having been finally determined, but, on the contrary, the Commissioner kept the case open and kept reexamining the situation; that the Commissioner's act on or about July 14, 1924 (which, we submit, dealt only with 1918), of determining that the Trumble Refining Company's patent license agreements had a March 1, 1913, value of $160,000, vacated and set aside whatever determination he had made that the Trumble Refining Company's tax liability should be determined under the provisions of Section 210 of the Revenue Act of October 3, 1917.

Specification of Errors To Be Urged.

I.

The Court erred in rendering judgment against the defendant and in favor of the plaintiffs in the amount of $33,575.01, together with interest, for the reason that the Court had no jurisdiction of the subject-matter of this action, the tax sought to be recovered having been assessed under the special assessment provisions of Section 210 of the Revenue Act of 1917.

II.

The Court erred in overruling and denying the defendant's motion for judgment for the reason that there was no substantial or sufficient evidence before the Court upon which to predicate a judgment for the plaintiffs and from said evidence the Court should have concluded, held and found as follows:

1. That no action for the recovery of any part of the sum of $11,870.88 paid by the Trumble Refining Company on June 14, 1918, as income and excess profits taxes for the calendar year 1917 was commenced within five years from the payments of said tax or any part thereof, nor within two years from December 13, 1921, the date upon which the Commissioner of Internal Revenue rejected the claim for refund filed by the taxpayer on July 2, 1920, and that the plaintiffs herein are barred by the provisions of Section 3226 of the Revised Statutes of the United States from recovering any part of the said tax paid on June 14, 1918;

2. That no claim for the refund of the sum of $6,213.83, paid by the Trumble Refining Company on May 22, 1923, as additional income and excess profits taxes for the calendar year 1917 was filed

within five years from the payment of said tax or any part thereof, and that the plaintiffs herein are barred by the provisions of Section 284(b)(1)(2) of the Revenue Act of 1926 from a recovery in this action of any part of said tax paid on May 22, 1923;

3. That the tax involved in this action was determined and assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917, and that this Court has no jurisdiction to review the determination of said tax made by the Commissioner of Internal Revenue;

4. That the defendant in this action is entitled to judgment against the plaintiffs for its costs.

III.

The Court erred in denying the defendant's motion for arrest of judgment and dismissal of the action, for the reason that the Court had no jurisdiction on the subject-matter of this action, the tax sought to be recovered having been assessed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917.

IV.

The Court erred in adopting its conclusion of law numbered I, for the reason that said conclusion of law is not supported by the facts found by the Court in that said findings of fact numbered XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII and XXIII disclose that the claim for refund of 1917 taxes filed by the Trumble Refining Company on July 2, 1920, was rejected by the Commissioner of Internal Revenue on December 13, 1921, and that there was thereafter no reconsideration of said claim for refund by any officer of the Bureau of Internal Revenue possessed with the authority to reopen or

reconsider refund claims, although there was thereafter elaborate consideration given to a proposal to assess additional taxes for the year 1918 and the Commissioner had the consideration of a claim for abatement of additional taxes assessed for the year 1917, which claim was filed on January 21, 1922, under advisement until February 5, 1923, when $151.17 of the additional tax was abated. The Trumble Refining Company paid the balance of said additional tax assessed for the year 1917 on May 22, 1923, and filed no claim for the refund thereof within five years thereafter.

V.

The Court erred in adopting its conclusion of law numbered II, for the reason that said conclusion of law is not supported by the facts found by the Court in that said findings of fact numbered XXI, XXII and XXIII failed to disclose that the Committee on Appeals and Review ever considered the tax liability of Trumble Refining Company for the year 1917, but on the contrary it is disclosed that only additional tax liability for the year 1918 was under consideration by the Commissioner of Internal Revenue on June 14, 1924, or at any other time subsequent to February 5, 1923.

VI.

The Court erred in adopting its conclusion of law numbered III, for the reason that said conclusion of law is not supported by facts found by the Court or evidence before the Court in that it appears from the

findings of fact that none of the Trumble Refining Company's income tax for the year 1917 was paid subsequent to May 22, 1923, and the claim for refund sued upon was not filed until April 25, 1929, and after the time allowed by law for the filing of a claim for refund had expired.

VII.

The Court erred in adopting its conclusion of law numbered IV, for the reason that it appears from the evidence and the facts found by the Court that the tax involved was computed under the Special Assessment provisions of Section 210 of the Revenue Act of 1917 and that the Court is without jurisdiction to review the Commissioner's determination of said tax.

VIII.

The Court erred in adopting its conclusion of law numbered V, in that said conclusion of law is not supported by the facts found by the Court in the following respects:

(a) It has been found by the Court that the tax reported by the Trumble Refining Company on its 1917 corporate income tax return was paid on June 14, 1918 (Findings III); that a claim for the refund of this tax was filed July 2, 1920 (Findings XI), and it appears in the pleadings herein no suit was brought upon said claim within the statutory period of two years after its rejection;

(b) It has been found by the Court that the additional tax determined and assessed against the Trumble Refining Company for the taxable year 1917

was paid on May 22, 1923 (Findings XX) and that no claim for the refund thereof was filed until April 25, 1929 (Findings XXIV), or more than five years after said payment and subsequent to the time allowed by law for the filing of a claim for the refund of said tax paid on May 22, 1923.

IX.

The Court erred in making its findings of fact numbered IV, V, VIII, XIV, XV, XVIII, XIX, XXI, XXII, XXIII, XXVII, XXVIII and XXXI, in that said findings are not supported by the evidence before the Court and that the facts therein found relate to a proposed additional tax for the calendar year 1918 and not to any taxes paid for the year 1917.

X.

The Court erred in adopting its findings of fact numbered XXIV, in that the evidence before the Court discloses that the claim for refund in the sum of $17,764.08 filed on April 25, 1929, was an original claim for refund filed more than five years after the taxes involved had been paid and was not an amendment or revision of any claim for refund previously filed for taxes paid for the calendar year 1917.

XI.

The Court erred in refusing to adopt the findings of fact and conclusions of law requested by the defendant, in that the same were in accordance with and required by the evidence before the Court.

Summary of Argument.

I.

The filing of a proper and timely claim for refund and the institution of suit within the prescribed period after a rejection thereof are steps essential to the *jurisdiction* of the Court in a case of this kind. The sovereign may not be sued except upon its consent, and then only upon the conditions under which it has consented to be sued.

When applicable legal principles are applied to admitted facts of record, the conclusion is inevitable that there was no further consideration by the Commissioner of the 1917 case after the final redetermination in February, 1923, and the enforced collection of the additional tax so determined in May, 1923. To rebut this evident finality, the taxpayer relies upon the two flimsy theories that (1) some unnamed subordinate to the Commissioner orally told its representative in December, 1922, that the 1917 case would be held in abeyance pending review of subsequent years, and (2) that the 1924 protest brief amounted to a request for reconsideration of the 1917 case, which was acted upon by the Commissioner.

As to the first theory, the subsequent physical facts definitely show that such an oral statement was not authorized by the Commissioner. In February, 1923, the taxpayer was duly advised of the final redetermination of the 1917 taxes, and in May, 1923, a request based upon the alleged oral assurance was officially denied and full settlement of the 1917 taxes was thereupon enforced.

Now, as to the second theory, that the consideration of the 1924 protest brief amounted to a reopening of the 1917 case: While the telegram sent to the taxpayer in May, 1923, stated that a further conference might be

arranged on the 1917 case if a formal protest were filed (and the case might well have been reopened if any new and material facts had been forthcoming), the answer is that no such protest was made. There was a delay of about a year before any further document was filed by the taxpayer. Even if that protest brief had specifically requested a reopening of the 1917 case, such reopening would not necessarily have followed, since it is apparent that the grounds therein outlined were the same as had already been presented to and rejected by the Commissioner for 1917. However, a full study of the record discloses that the 1924 protest brief was directed at the 1918 taxes which had not yet been finally assessed, rather than the 1917 taxes, which had not only been assessed but fully paid.

Moreover, the original claim for refund itself was premature, since there was an additional assessment of the $6,300 item which had not been paid when the claim for refund of the $9,800 item was first filed. Of course, the filing of the 1929 claim for refund and its subsequent rejection was of no legal significance unless the matter was still open and under consideration of the Commissioner.

II.

The court below found that when the tax here in question was redetermined by the Commissioner, it was computed under the special assessment provisions of Section 210 of the Revenue Act of 1917. It is now settled that the determination by the Commissioner of a taxpayer's

liability for profits taxes under the comparable special assessment provisions of the Revenue Act of 1918 (Sections 327 and 328) precludes judicial review either of the amount of the profits taxes or of the amount of the income tax so determined. The same should be true, and, we submit, it is true where the tax for the year 1917 has been determined by the Commissioner pursuant to the special assessment provisions of Section 210 of the Revenue Act of 1917.

The taxpayer places great emphasis upon the finding of the court below that it did not request or acquiesce in the special assessment. Neither the Revenue Act of 1917 nor of 1918 in any way made the imposition of the special assessment provisions dependent upon the request for application thereof by the taxpayer. In both acts, the imposition of the special assessment provisions is mandatory where the Commissioner was then unable to determine the taxpayer's invested capital.

Thus, once we have the proper application of the special assessment provisions (whether predicated upon the request of the taxpayer or upon direction of Congress) the consequences are to be governed by the same legal principles. Accordingly, it is immaterial that this case arose under the 1917 Act and involved no request by the taxpayer for the special assessment. The Supreme Court decisions are equally applicable to the case at bar.

ARGUMENT.

I.

The Claim Is Not a Timely One.

The Court erred in overruling and denying the defendant's motion for judgment for the reason that there was no substantial or sufficient evidence before the Court upon which to predicate a judgment for the plaintiffs and from said evidence the Court should have concluded, held and found as follows:

1. That no action for the recovery of any part of the sum of $11,870.88 paid by the Trumble Refining Company on June 14, 1918, as income and excess profits taxes for the calendar year 1917, was commenced within five years from the payments of said tax or any part thereof, nor within two years from December 13, 1921, the date upon which the Commissioner of Internal Revenue rejected the claim for refund filed by the taxpayer on July 2, 1920, and that the plaintiffs herein are barred by the provisions of Section 3226 of the Revised Statutes of the United States from recovering any part of the said tax paid on June 14, 1918;

2. That no claim for the refund of the sum of $6,213.83, paid by the Trumble Refining Company on May 22, 1923, as additional income and excess profits taxes for the calendar year 1917 was filed within five years from the payment of said tax or any part thereof, and that the plaintiffs herein are barred by the provisions of Section 284(b) (1) (2) of the Revenue Act of 1926 from a recovery in this action of any part of said tax paid on May 22, 1923.

The filing of a proper and timely claim for refund and the institution of suit within the prescribed period after a rejection thereof are steps essential to the *jurisdiction* of the Court in a case of this kind. The sovereign may not be sued except upon its consent, and then only upon the conditions under which it has consented to be sued. The filing of a proper claim after the payment of the taxes in question as a prerequisite to a suit is a familiar provision of revenue laws. The necessity for filing such a claim is not dispensed with because the claim may be rejected. "* * * it is not within the judicial province to read out of the statute the requirement of its words." (*United States v. Felt & Tarrant Co.,* 283 U. S. 269, 273.) In that case the Supreme Court refused to allow a claim for abatement to serve as a claim for refund. See also to the same effect, *Rock Island etc. R. R. v. United States,* 254 U. S. 141.

A further principle is that a belated second refund claim can not serve to bring about a reopening of the barred claim, even though the Commissioner had considered and rejected such second claim. In *B. Altman & Co. v. United States,* 40 Fed. (2d) 781 (C. Cls.), certiorari denied, 282 U. S. 863, the Court said (p. 784):

> "The second refund claim, filed almost four years after the first, raises no new issue, involves no additional assessment made subsequent to the filing and denial of the first, and could not by any possibility occasion a reopening of plaintiff's tax liability; and while the Commissioner may not be in a position to forestall the filing of duplicate claims for refund, section 3226, Revised Statutes, manifestly does not contemplate the repetition of contentions for refund in such a way and at such times as to toll the running

> of the limitation period. The purpose of limiting suits to recover alleged illegal tax exactions is evident, and if plaintiff by repeating its contentions in two refund claims may establish jurisdiction to sue, despite the limitation prescribed in the law, litigation would be prolonged indefinitely. The act of the Commissioner in rejecting the second refund claim is without legal significance, for when it was filed and afterwards rejected plaintiff's right to sue had lapsed by limitation."

It now seems appropriate to outline briefly the pertinent facts in this case. For the year in question, 1917, the taxpayer originally returned a taxable income of some $89,000, on which a tax in excess of $11,000 was paid in 1918. In February, 1920, the Commissioner advised that a recomputation showed an additional tax of some $6,300 was due. In June, 1920, the taxpayer filed an amended return claiming that it should be allowed a deduction for depreciation of approximately $54,000, and on that theory filed not only an abatement claim as to an additional $6,300, but a refund claim for approximately $9,800 of the original tax paid. Both of these claims were rejected by the Commissioner in December, 1921.

Following a demand for payment of the additional $6,300 in January, 1922, the taxpayer again asked an abatement, and in February, 1922, it filed a protest brief dealing not only with its 1917 contentions, but also with subsequent years. A current report of the revenue agent recommended an additional assessment of some $40,000. Taxpayer's representative had a conference in December, 1922, with an unnamed official of the Bureau of Internal Revenue, who, allegedly, stated that the 1917 taxes would be held in abeyance pending final determination of the years

1918 to 1920. Since the time was about to expire, and the Commissioner had not yet acted upon the revenue agent's recommendation of additional assessment, a waiver was requested and obtained from the taxpayer extending the time within which to make such additional assessment as to 1917. However, the Commissioner subsequently decided not to make such additional assessment, and in February, 1923, advised the taxpayer [R. 150] that a redetermination of its taxes for 1917 had resulted in an overassessment of $151.17, which was thereupon duly scheduled [R. 151]. This, we submit, is the final action by the Commissioner as to the 1917 assessment. It is true that the taxpayer subsequently requested, by letter in February, 1923, and by telegram in May, 1923, that such redetermination be held in abeyance, but the only response of the Commissioner was by telegram in May, 1923, advising the taxpaper that collection of the 1917 taxes could not be withheld, but that if a formal protest was filed as to such year, a further conference might be had.

Accordingly, the $6,300 additional assessment was paid by the taxpayer in May, 1923, but the formal protest as to 1917 was not forthcoming. It is the Government's position that there had at this time been a final rejection of all claims, followed by a full payment of that year's taxes, and that with reference to 1917 there was no act by either party of legal significance after that time. Accordingly, when in 1929 the taxpayer had finally prevailed before the Board in a subsequent tax year, involving among others the claim for deduction, it was too late for the taxpayer to revive by a so-called amended claim for refund the 1917 case long since barred by a lapse of time.

The protest brief filed by the taxpayer in 1924 [R. 252] was not filed pursuant to the Commissioner's telegram

dealing with 1917 taxes. A year had now elapsed since those taxes were paid. The correspondence between the parties leading up to this 1924 protest brief, which will be referred to in detail subsequently, clearly shows that the parties were dealing specifically with proposed additional taxes for 1918.

When applicable legal principles are applied to admitted facts of record, the conclusion is inevitable that there was no further consideration by the Commissioner of the 1917 case after the final redetermination in February, 1923, and the enforced collection of the additional tax so determined in May, 1923. To rebut this evident finality, the taxpayer relies upon the two flimsy theories that (1) some unnamed subordinate to the Commissioner orally told its representative in December, 1922, that the 1917 case would be held in abeyance pending review of subsequent years, and (2) that the 1924 protest brief amounted to a request for reconsideration of the 1917 case, which was acted upon by the Commissioner.

As to the first theory, the subsequent physical facts definitely show that such an oral statement was not authorized by the Commissioner. In February, 1923, the taxpayer was duly advised of the final redetermination of the 1917 taxes, and in May, 1923, a request based upon the alleged oral assurance was officially denied and full settlement of the 1917 taxes was thereupon enforced. It is hard to see how the taxpayer, in the face of these vital facts, could still claim that the 1917 case was being held in abeyance by the Commissioner. Furthermore, the oral assurance by the unnamed subordinate was obviously not authorized. In *Ritter v. United States,* 28 Fed. (2d) 265 (C. C. A. 3d), an oral assurance by one of the Commissioner's agents assigned to the case that an overpayment

had been found and would be refunded as a matter of course in due time was held not to relieve the taxpayer of the necessity for filing a formal claim for refund, as the statute required. The Court pointed out that the statutory requisites for suit against the sovereign are very specific and can not be waived by informal action of a subordinate. On the strength of this decision, the Court, in *Hawkins v. United States,* 14 Fed. Supp. 429 (W. D. Pa.), held that certain oral statements between the taxpaper and an unidentified representative of the Commissioner had no evidential value as to claims for refund.

Now, as to the second theory, that the consideration of the 1924 protest brief amounted to a reopening of the 1917 case: While the telegram sent to the taxpayer in May, 1923, stated [R. 26] that a further conference might be arranged on the 1917 case if a formal protest were filed (and the case might well have been reopened if any new and material facts had been forthcoming), the answer is that no such protest was made. There was a delay of about a year before any further document was filed by the taxpayer. Even if that protest brief had specifically requested a reopening of the 1917 case, such reopening would not necessarily have followed, since it is apparent that the grounds therein outlined were the same as had already been presented to and rejected by the Commissioner for 1917. However, a full study of the record discloses that the 1924 protest brief was directed at the 1918 taxes which had not yet been finally assessed, rather than the 1917 taxes, which had not only been assessed but fully paid. Though the brief made a passing reference in the opening statement [R. 253] to the 1917 taxes, as well as the 1918 taxes, the first paragraph of the outline of the brief shows that it dealt specifically with an

appeal to the Committee on Appeals and Review from the contentions of the income tax unit set forth in a memorandum dated January 14, 1924, which [R. 322] was concerned only with the 1918 taxes. The taxpayer's letter transmitting the protest brief was directed to the chairman of the Committee on Appeals and Review and made reference to the appeal pending before the Committee "in connection with the proposed assessment of additional income and profits taxes for the year 1918." [R. 252.] As to that and subsequent years, which were still open, the Committee made certain recommendations and on November 6, 1924, the Commissioner issued notices of deficiencies for the years 1918, 1919 and 1920 [R. 286], whereupon the taxpayer filed an appeal with the newly created Board of Tax Appeals.

It seems quite evident that the proceedings before the Committee were concerned with the years 1918, 1919 and 1920. There was no further consideration by the Committee of the 1917 taxes, and certainly none is shown by any other representative of the Commissioner. Even if the Committee had taken upon itself the task of reconsidering the 1917 taxes, such action would have been ineffective because the Committee had no authority to deal with any years other than the one specifically referred to it. See in this connection *Boyce v. United States,* 21 Fed. Supp. 274 (C. Cls.), certiorari denied, October 13, 1938. There, the Commissioner referred to the Special Advisory Committee in the Bureau of Internal Revenue a pending appeal for 1923. There, as here, the same ground for refund was involved as had been asserted and rejected in prior years, *i.e.,* the allowability of depreciation deductions. In considering the case referred to it for action, the Committee obtained the files and the claims for refund

in the previous years and even went to the extent of having a recomputation made for such prior years. In the suit ultimately brought by the taxpayer, for the taxes paid in such prior years, the taxpayer claimed that such consideration by the Committee constituted a reopening of the old claims for refund so as to remove those prior years from the bar of the statute of limitations. The Court concluded that the Committee was authorized to consider only such matters as were specifically delegated to it. Accordingly, no legal significance attached to its action in consulting claims for prior years.

In the case at bar, the 1917 tax had been finally determined after investigation and conferences, and the full payment of the tax had been required. The taxpayer might have proceeded by timely suit in the Federal courts to enforce a refund of such payment, but it did not do so. Although the final action had been taken on this tax year in May, 1923, when the Commissioner refused to withhold collection, the taxpayer made no further move for nearly six years, when in April, 1929, it, in effect, asked the Commissioner to reopen the old 1917 claim and allow the refund in view of the decision which the Board of Tax Appeals had just rendered in its favor as to subsequent years. [R. 157.] In July, 1930, the Commissioner notified the taxpayer of the rejection of such request. [R. 164.] In the taxpayer's letter of August 5, 1930 [R. 311], we find no contention that the old claim for refund for 1917 was still open and under consideration, but merely a plea that in view of the Board's decision the Commissioner should now reopen the barred claim for the reason that related claims for subsequent years were dealt with by the Board decision and a compensating adjustment was necessary for 1917 under T. D. 4235 [Appen-

dix, *infra*]. On November 3, 1930, the taxpayer was advised that T. D. 4235 was not applicable to the case at bar. [R. 314.]

It will be recalled that the amount now sought was paid at two different times: (1) The $9,800 item was paid in 1918, and (2) the $6,300 item was paid in 1923. The case might be divided into two parts, the first being concerned with the right to the $9,800 item, and the second to the effectiveness of the claim to the return of the $6,300 item. The foregoing discussion takes care of the $9,800 item, as to which a claim for refund was filed after payment thereof. However, there is an additional reason why the $6,300 item can not be refunded.

As already pointed out, the only claim for refund ever filed in this case, prior to the belated claim in 1929, was filed in 1920, at which time the $6,300 item had not yet been paid. A separate abatement claim was filed as to this item, but it was later rejected and a payment of the item was required in May, 1923. An abatement claim can not be treated as an informal claim for refund so as to support a suit. (*Rock Island etc. R. R. v. United States, supra.*) A sufficient claim for refund must be filed *after* the payment of the item in controversy. As already pointed out, the only formal action taken by the taxpayer after this payment was the protest brief filed in 1924 with the Committee on Appeals and Review after notice that the *1918 tax year* had been assigned to it for consideration. The taxpayer had already been notified that the Committee was authorized to consider only the 1918 taxes. [R. 322.] In fact, the antecedent request of the taxpayer for such a review referred solely to the tax year 1918. [R. 329.] Obviously, this protest brief filed for the specific purpose of contesting the 1918 taxes before the

Committee, authorized by the Commissioner to hear this particular claim, could not constitute a claim for refund as to the 1917 taxes or any part thereof. O. D. 709, Appendix, *infra,* outlines the procedure for the reference to the Committee of specific cases. In *Williamsport Co. v. United States,* 277 U. S. 551, the Supreme Court recognized the nature of the Committee's work, regarding it as an informal predecessor of the Board of Tax Appeals. Surely, it must be recognized that the Board of Tax Appeals has authority to consider and act upon only those tax years properly before it. It is immaterial that the Committee had the old files and protests bearing upon the 1917 case before it for comparison and study, as the taxpayer's representative testified in an effort to show actual reconsideration by the Commissioner. A mere re-examination of the files and papers, even by the Commissioner himself, is not sufficient to constitute a reopening and reconsideration. (*R. J. Ederer Net & Twine Co. v. United States,* 7 Fed. Supp. 282 (C. Cls.).) The material point here is that the Committee was authorized to make recommendations only as to 1918, so it could not reopen the 1917 case, even if it tried to, and the record is bare of any effort to do so. Furthermore, even if the 1924 protest brief had effectively embodied the 1917 claim, reference to such outside year would be just so much waste motion, just as it would be in a case before the Board or a Court.

There was nothing to revive or reopen as to the $6,300 item, for it was paid after the old claim was filed, and no other claim for refund had been filed subsequent to its payment.

In the recent case of *Riverside Hospital v. Larson* (S. D. Fla.), decided October 14, 1938, not officially reported but found in 1938 C. C. H., Vol. 4, paragraph 9542,

the rule is laid down that the suit was premature where it was based upon a claim for refund filed before full payment of the tax in question. This brings us back to the Supreme Court ruling referred to above that the statute contemplated a proper refund claim *after* payment of the tax. This, of course, means payment of the full tax as assessed by the Commissioner. This is brought out by the decisions holding that the limitations period runs from the payment of the last portion of the tax. In *Hills v. United States,* 50 Fed. (2d) 302 (C. Cls.), the original tax of $18,000 had been paid in 1921. A deficiency of $1,700 was paid in 1925. Section 3228 of the Revised Statutes provides that all claims for refund of taxes must be presented to the Commissioner within four years "after the payment of such tax." The Court of Claims held that the payment of such tax meant the payment of the entire tax liability involved; that satisfaction of such liability was not made until 1925; and that therefore a claim for refund filed in 1928 was timely. See also *San Joaquin Light & Power Corp. v. McLaughlin,* 65 Fed. (2d) 677 (C. C. A. 9th).

On this theory, the original claim for refund itself was premature, since there was an additional assessment of the $6,300 item which had not been paid when the claim for refund of the $9,800 item was first filed. Of course, the filing of the 1929 claim for refund and its subsequent rejection was of no legal significance unless the matter was still open and under consideration of the Commissioner. (*B. Altman & Co. v. United States, supra.*)

The fact that a written protest was filed subsequent to the payment (even if it had been directed at this particular year) does not eliminate the necessity of filing an appropriate claim for refund as to the pertinent item. (*Oliver*

Typewriter Co. v. United States, 14 Fed. Supp. 543, 549 (C. Cls.).) "* * * the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded." (*United States v. Felt & Tarrant Co., supra,* p. 272.)

There is no basis for the taxpayer's contention that there was no final rejection of the original claim for refund. It was specifically rejected in December, 1921, and the abatement claim was rejected at the same time. Even if we assume that there was an informal reconsideration of such action, there was a very emphatic denial of further relief, except as to the nominal sum of $150, when the additional assessment was collected in May, 1923, over the telegraphic protest of the taxpayer. We submit that at least from that time on the 1917 assessment was closed so far as the Commissioner was concerned. Any further action on his part dealt solely and specifically with the subsequent tax years 1918 to 1920. This is very definitely substantiated by the correspondence between his office and the taxpayer leading up to the reference of the 1918 case to the Committee on Appeals and Review, and the consequent filing of the protest brief before the Committee in this matter by the taxpayer. The Bureau document [R. 323] referring the matter to the Committee clearly shows that the Committee was authorized to consider only the tax year 1918. Even if we assume, *arguendo,* that the 1924 protest brief made sufficient reference to 1917 to constitute a request for reopening, it must be remembered that it was made to the Committee, rather than to the Commissioner. The Committee was not authorized to reopen closed cases, but only to make administrative recommendations as to cases specifically referred to it. Anyway, the Committee did not consider the protest brief as

referring to any but the 1918 taxes, and in its final recommendation did not attempt to go back of the year 1918. Thus, the Committee not only was not authorized to reconsider the 1917 taxes, but it made no attempt to do so.

We have no action at all from the Government's angle on the 1917 taxes after the enforced collection of the additional deficiency in May, 1923. It will be recalled that even the vague assurances of an unnamed subordinate that the 1917 case would be held in abeyance took place back in 1922, sometime before the final redetermination and the ultimate enforced collection of the additional deficiency. We submit that there is nothing in the record to support the lower court's conclusion that the 1917 case was reopened and held in abeyance pending the final outcome of appeals in later years. We find absolutely no action by the Commissioner following the collection of the 1917 taxes in 1923, except as was directed specifically at 1918 and subsequent tax years. It must be remembered in this connection that the concept of separable tax years is fundamental in our income tax system. The only action we find by the taxpayer after the final payment of the 1917 taxes was the protest brief filed with the Committee on Appeals and Review which, as already pointed out, was pursuant to a specific appeal of the 1918 case.

Where, then, is the authority for the Commissioner in 1929 to revive a claim which was rejected in 1921 and on which the final payment was made in 1923? Congress has very emphatically limited the authority to cases in which timely action is taken by the taxpayer. To permit the 1917 case to be kept alive because the taxpayer was still protesting the taxes assessed for subsequent years would vitiate any statute of limitations enacted by Congress and would vitiate the fundamental concept in tax law of the separable tax years.

II.

The Tax in Question Was Determined by Special Assessment and Is Not Subject to Review.

The Court erred in rendering judgment against the defendant and in favor of the plaintiffs in the amount $33,575.01, together with interest, for the reason that the Court had no jurisdiction of the subject matter of this action, the tax sought to be recovered having been assessed under the special assessment provisions of Section 210 of the Revenue Act of 1917.

The court below found [R. 45] that when the tax here in question was redetermined by the Commissioner, it was computed under the special assessment provisions of Section 210 of the Revenue Act of 1917. [Appendix, *infra.*] It is now settled that the determination by the Commissioner of a taxpayer's liability for profits taxes under the comparable special assessment provisions of the Revenue Act of 1918 (Sections 327 and 328) precludes judicial review either of the amount of the profits taxes (*Heiner v. Diamond Alkali Co.,* 288 U. S. 502), or of the amount of the income tax so determined (*Welch v. Obispo Oil Co.,* 301 U. S. 190). The same should be true, and, we submit, it is true where the tax for the year 1917 has been determined by the Commissioner pursuant to the special assessment provisions of Section 210 of the Revenue Act of 1917. (*Joseph Joseph & Bros. Co. v. United States,* 71 Fed. (2d) 389 (C. C. A. 6th), certiorari denied, 293 U. S. 600. Cf. *Central Iron & Steel Co. v. United States,* 6 Fed. Supp. 115 (C. Cls.), certiorari denied, 293 U. S. 563.) The taxpayer places great emphasis upon the finding of the court below [R. 55] that it

did not request or acquiesce in the special assessment. Neither the Revenue Act of 1917 nor of 1918 in any way made the imposition of the special assessment provisions dependent upon the request for application thereof by the taxpayer. In both acts, the imposition of the special assessment provisions is mandatory where the Commissioner was then unable to determine the taxpayer's invested capital. In addition to this, Section 327 of the Revenue Act of 1918 made the imposition of special assessment mandatory where the taxpayer was a foreign corporation. In *Welch v. St. Helens Petroleum Co.*, 78 Fed. (2d) 631, this Court rejected the taxpayer's contention that the reviewability of the Commissioner's action must be predicated upon a request for or acquiescence in the special assessment. There, the taxpayer pointed out that since it was a foreign corporation and the use of the special assessment was mandatory, the Supreme Court decisions denying reviewability were inapplicable. It further pointed out in that case, as here, that the taxpayer was not questioning the comparatives used or the rate fixed by the Commissioner, but only questioned the proper base upon which the tax should be computed, namely, the amount of net income. In rejecting the taxpayer's argument, this Court pointed out that (pp. 635-636):

> "The court cannot determine what would be the effect upon the total tax of a change of the amount of net income. That question lies in the discretion of the Commissioner, and, so far as we know, a change of the net income might result in a corresponding change in rate. While it may be true in the case at

> bar that the Commissioner would have selected the same rate whether or not he allowed the relatively small deduction of the British tax, it is obvious that the rate of taxation might be materially changed by the Commissioner by reason of the comparisons with other corporations and taxpayers required to be made by him in fixing the amount of tax."

A profits tax computation under Section 210 of the Revenue Act of 1917, is, indeed, *based upon a comparison* with a group of representative concerns engaged in a like or similar trade or business. The Commissioner, as a very first step, when unable satisfactorily to determine invested capital, selects concerns which, in his judgment, are proper comparatives and then determines a deduction for the taxpayer corporation which (before the addition of the statutory $3,000) bears the same ratio to the taxpayer's net income that the average deduction of the comparatives (before addition of $3,000) bears to the average net income of the comparatives. The deduction determined for the taxpayer under Section 210, the Commissioner then computes a constructive invested capital for the taxpayer, also by a comparative method, of course using the same corporations which he has just used in determining the taxpayer's proper deduction. See Regulations 41, Article 18, Appendix, *infra*. With deduction and constructive capital thus determined and with net income already determined, the Commissioner is then prepared to compute the taxpayer's profits tax liability. The computation is then made at the rates prescribed by

Section 201, using the deduction determined by comparison, as heretofore described, plus $3,000 (Sec. 210), and also using the determined constructive invested capital. That is the method prescribed by Section 210 (in conjunction with Secs. 201 and 1005) of the Revenue Act of 1917 for determining a tax liability for the year 1917 by what, in common speech, is known as "special assessment."

The similarity of the special assessment procedure under the 1917 and 1918 Acts is established in *Joseph Joseph & Bros. Co., supra.* It, too, was a suit for refund of tax paid for 1917 by a taxpayer whose liability had been computed and determined under Section 210 of the 1917 Act. In that case, the Court said (p. 391):

> "* * * section 210 and sections 327 and 328 are so similar in purpose and in the procedure provided as to compel the conclusion that the District Court has no more authority to review the action of the Commissioner under one section than under the other."

Cf. *McDonnell v. United States,* 59 Fed. (2d) 290 (C. Cls.), affirmed without discussion of this issue, 288 U. S. 420. Cf., also, *Cleveland Automobile Co. v. United States,* 70 Fed. (2d) 365, certiorari denied, 293 U. S. 563; *Welch v. Obispo Oil Co., supra; Williamsport Co. v. United States, supra; Heiner v. Diamond Alkali Co., supra.*

The similarity of the 1917 provisions with the 1918 provisions is further borne out by the following excerpt from

the decision in *Central Iron & Steel Co. v. United States, supra,* which involved the 1917 provisions (at page 116):

> "Upon careful consideration thereof we are of opinion that the court is without jurisdiction in any case where the Commissioner has allowed special assessment and determined the tax under the special assessment section of the statute when the result of the court's decision, if in favor of the plaintiff on the question presented, would alter or abrogate the Commissioner's determination under the special assessment provision, or necessitate further consideration by the Commissioner for the purpose of determining whether the profits tax rate theretofore fixed under the relief provisions should be increased or decreased, or whether the decision of the court on the question concerning the correct income had removed the abnormality upon the basis of which special assessment had been allowed. While the last-mentioned feature would not be presented in a case like the one at bar, involving 1917, where the only ground for special assessment is the inability satisfactorily to determine invested capital, *the principle is the same whether the case arises under the act of 1917 or 1918, for the reason that net income is one of the principal factors* in determining the constructive invested capital and amount of the profits tax." (Italics supplied.)

Obviously, the special assessment provisions of the Revenue Act of 1918 add to the grounds for special assessments specified in the 1917 Act. In certain of the grounds enumerated in the 1918 Act, the request on the part of the

taxpayer is anticipated, but in the 1917 Act, as well as in the portion of the 1918 Act dealing with foreign corporations, no such request was contemplated by Congress. The choice of action was vested in the Commissioner and under the specified conditions, the special assessment provisions were made applicable. Thus, once we have the proper application of the special assessment provisions (whether predicated upon the request of the taxpayer or upon direction of Congress), the consequences are to be governed by the same legal principles. Accordingly, it is immaterial that this case arose under the 1917 Act and involved no request by the taxpayer for the special assessment. The Supreme Court decisions are equally applicable to the case at bar. We submit that the taxpayer here must fail as it did in *Welch v. Obispo Oil Co., supra,* where the Supreme Court observed (p. 196):

> "* * * the taxpayer's true net income is an essential factor in the determination of his liability under §§327 and 328 [of the 1918 Act]; and it follows that the making of the special assessment precludes review by a court of the income tax [and the amount of net income] determined."

The taxpayer and the court below relied upon the case of *McKeever v. Eaton,* 6 Fed. Supp. 697 (Conn.). We submit that this case is unsound and out of line with the Supreme Court authorities. In *Con P. Curran Printing Co. v. United States,* 14 Fed. Supp. 638 (C. Cls.), certiorari denied, 301 U. S. 686, the court refused to follow

the *McKeever* case in view of the recent Supreme Court decisions. There, the court said (p. 646):

> "Plaintiff calls attention to the fact that it does not seek to change the rate of the tax as fixed by the Commissioner under the special assessment, and contends that, as it does not seek to alter the rate, it is not precluded from showing that the Commissioner made errors in his calculation of the amount of net income. Several cases are cited in support of this contention of plaintiff. With one exception, the facts were quite different, and the courts did not have before them the question now involved. Some statements were made in *McKeever v. Eaton* (D. C.) 6 F. Supp. 697, that may seem to support this contention, but they do not accord with the rule laid down by the Supreme Court which has been followed by this court. In the case of *Heiner v. Diamond Alkali Co.*, 288 U. S. 502, 506, 53 S. Ct. 413, 414, 77 L. Ed. 921, it was said that the allowance of a special assessment was a matter of administrative discretion and that 'the Commissioner cannot make an administrative finding upon the question for decision under section 327(d) or that under 328 until he has determined the net income of the taxpayer.' "

Conclusion.

The ultimate findings of the court below, which are pertinent for purposes of this appeal, are not supported by the record. The conclusions of law are clearly erroneous. The judgment below should be reversed for two reasons: (1) The claim is barred by the lapse of time, and (2) it involves a special assessment, which is not reviewable.

Respectfully submitted,

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January, 1939.

APPENDIX.

Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:

SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

SEC. 213. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all necessary regulations for carrying out the provisions of this title, and may require any corporation, partnership, or individual, subject to the provisions of this

title, to furnish him with such facts, data, and information as in his judgment are necessary to collect the tax imposed by this title.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. (U. S. C., Title 26, Sec. 1433.)

* * * * * * * * *

SEC. 1113 (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the ex-

piration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 1672.)

Treasury Regulation 41, relative to the War Excess Profits Tax Imposed by the War Revenue Acts of October 3, 1917:

Art. 18. Constructive Capital for Application of Rates.—Where the deduction allowed to a taxpayer is determined under article 24, the invested capital for the purpose of applying the rates of taxation under article 16 shall be deemed to be an amount which bears the same ratio to the net income of the trade or business for the taxable year which the average invested capital for the corresponding calendar year of representative corporations, partnerships, and individuals engaged in a like or similar trade or business bears to their average net income.

The Commisisoner of Internal Revenue in determining for any calendar year the ratio which the average invested capital of representative corporations, partnerships, and individuals engaged in any particular trade or business bears to their average net income, will include the invested capital and net income of representative corporations and partnerships for fiscal years ending during such calendar year. * * *

Art. 24. When Invested Capital Can Not Be Satisfactorily Determined.—If the Secretary of the Treas-

ury is unable satisfactorily to determine the invested capital, the deduction shall be the sum of—

(1) An amount equal to the same proportion of the net income of the trade or business for the taxable year as the average deduction (determined in the same manner as provided in article 21 without including the $3,000 or $6,000 therein referred to) for the corresponding calendar year, of representative corporations, partnerships, and individuals engaged in a like or similar trade or business, is of their average net income, plus

(2) In the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States, $6,000.

* * * * * * * * *

In every case of a trade or business having invested capital a return shall be made in the first instance in accordance with article 21 or 23, but the taxpayer may submit therewith a statement of reasons why in his opinion the tax should be assessed in accordance with this article.

O. D. No. 709, 3 Cumulative Bulletin 370:

SECTION 1301.—ADVISORY TAX BOARD. (COMMITTEE ON APPEALS AND REVIEW.)

SECTION 1301, ARTICLE 1702: Procedure before Advisory Tax Board. (Committee on Appeals and Review.)

43-20-1272
O. D. 709

A RULE FOR PROCEDURE ON APPEALS FROM THE INCOME TAX UNIT.

When an appeal is taken from a ruling of the Income Tax Unit to the Committee on Appeals and Review or a question is certified to that Committee at the request of

the taxpayer and an oral presentation is desired, the record shall immediately be examined to ascertain as to whether there is a question of law involved. If it is found that a question of law is involved, the Solicitor shall be notified and he will thereupon designate one member of the Solicitor's office to sit with the Committee and himself for the purpose of hearing the appeal, or if the Solicitor finds it inconvenient to sit with the Committee he may designate two members of his office to do so.

At the hearing before the Committee the taxpayer or his attorney or representative will be expected to make his full oral argument on the law as well as the facts, and this presentation shall be the only oral presentation except in unusual circumstances, or unless a further argument of the facts or the law is deemed desirable by either the Chairman of the Committee or the Solicitor.

The attorney or attorneys so designated by the Solicitor for the hearing will be expected, in conjunction with the Solicitor and the Conference Committee in the Solicitor's office, if the Solicitor so desires, to consider the legal aspects of the case, and the Solicitor's recommendation in the form of an opinion or memorandum will then be made to the Chairman of the Committee, and thereupon the Committee's findings shall be prepared and submitted to the Commissioner for his approval.

In any case of appeal there shall be filed with the Committee, either at the time of filing the appeal or on or before the date set for oral presentation, if oral argument is desired, a succinct written statement of the essential facts which the taxpayer desires to have considered in connection with his appeal, duly sworn to.

If the taxpayer, his attorney, or representative does not wish an oral argument, his argument may be made in the form of a written statement or brief which should be filed at the time the appeal is submitted to the Committee. If an oral presentation is to be made, the taxpayer, his attorney, or represenative may in addition thereto file such brief or briefs as he may desire. These briefs, not less than three copies of which should be furnished, may be either printed or typewritten, and where practicable should be filed not less than three days before the appeal is to be heard. Additional briefs may be filed at the time of or subsequent to the hearing within the time prescribed for the particular case by the Committee.

T. D. No. 4235, VII-2 Cumulative Bulletin 76:

I. Claims Disallowed Prior to May 29, 1928, in Which the Period of Limitation for Bringing Suit Has Expired.

(*a*) If a claim for refund or credit of an internal revenue tax was disallowed prior to May 29, 1928, and if the period of limitation for bringing suit in court has expired, such claim will be reopened if, but only if—

(1) The ruling pursuant to which the claim was disallowed was reversed by the Commissioner of Internal Revenue and an application for reopening was filed after such reversal and prior to the expiration of such period of limitation; or

(2) The refund or credit is properly allowable under a court decision or a decision of the Board of Tax Appeals and a case or an appeal involving the point upon which the refund or credit is allowable was pending after the disallowance of the claim and prior to the expiration of such period of limitation; or

(3) The refund or credit is properly allowable under a court decision or a decision of the Board of Tax Appeals to which the applicant was a party and the adjustment in accordance therewith requires a compensating adjustment (such as an adjustment in inventory, or invested capital, or the shifting of an item of income or loss from one taxable period to another) for one or more other taxable periods, and the application requests the reopening of the case for such other taxable periods; or

(4) The claim is based upon a question of fact and either (a) evidence of such fact was presented, in respect of the taxable year involved, prior to the expiration of such period of limitation, or (b) evidence of such fact was duly presented for another taxable period and an adjustment for such period accordingly made which requires a compensating adjustment (such as an adjustment in inventory, or invested capital, or the shifting of an item of income or loss from one taxable period to another) for one or more other taxable periods, and the application requests the reopening of the case for such other taxable periods, or (c) evidence of such fact was duly presented and a determination made in the closing of a case of another taxpayer and such determination decreases the tax liability of the applicant (such as a corporate distribution and a stockholder's liability in respect thereof, a determination of the distributive share of partners, the liability of a trustee and of a beneficiary, the liability of an estate and a decedent or of an estate and a distributee and the determination of the ownership of property).

(*b*) In no event will any such claim be reopened—

(1) Unless an application for reopening has been filed with the Commissioner of Internal Revenue on or before January 31, 1929; and

(2) Unless the refund or credit is properly allowable; and

(3) Unless the specific ground upon which the refund or credit is allowable was stated in the claim, or in an amendment thereof made prior to the expiration of the period of limitation upon the filing of a claim for refund or credit; and

(4) Unless the application for reopening states specifically the circumstances upon which the application is based.

(*c*) In no event will a refund or credit be allowed except to the extent that it is allowable on the merits without regard to any bar of the statute of limitations upon assessment or collection in respect of the taxable period involved and of each taxable period in which a compensating adjustment should be made; and in no case will the amount of the refund or credit exceed the amount properly refundable in respect of the grounds stated in the claim.

II. Claims Disallowed on or After May 29, 1928.

A case in which the claim was disallowed on or after May 29, 1928, is governed by section 608 of the Revenue Act of 1928, and no such case will be reopened if, under the provisions of such section, a refund would be considered erroneous.

III. Reopening Prior to the Expiration of the Statute of Limitations.

Any claim which has been disallowed will be reconsidered and allowed, at any time prior to the expiration

of the statute of limitations for bringing suit, if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening.

IV. Revocation of Treasury Decision 3240 [C. B. 5, 313].

Treasury Decision 3240 is hereby revoked.

D. H. Blair,
Commissioner of Internal Revenue.

Approved October 23, 1928.

A. W. Mellon,
Secretary of the Treasury.